Introduction

In October of 2006, the United States reached a historic landmark when its population surpassed 300 million people, placing the U.S. as the third most populous country behind China and India . Out of the 300 million people that currently inhabit the U.S., it is estimated that 100 million people, or one-third of the U.S. total population, are ethnic minorities. The number of ethnic minorities that comprise the U.S. population is increasing every year, and demographers are already predicting that the U.S. will continue to become racially and ethnically diverse in the years to come, with the Hispanic demographic comprising approximately 24% of the U.S. population by the time the country reaches the 400 million population mark. As these statistics indicate, and as most Americans know, the U.S. is a very ethnically diverse country.

The contributions that people of color have made in various U.S. industries, and continue to make today, has been impressive and lauded. However, the gains that U.S. ethnic minorities have made in the broadcast media ownership sector pales in comparison to the gains that they have made in other industries. Ethnic minority groups currently own less than 4% of all over the air radio and television broadcast stations in the U.S., that are regulated by the Federal Communications Commission. This statistic is startling in light of the Commission's mandate to regulate the use of the broadcast spectrum by issuing licenses to radio and television broadcasters in accordance with the public interest—a concept that, as the Commission has held previously, encapsulates diversity in media broadcast ownership and broadcast content.

Within the last fifteen years, the Commission, despite a prior history of regulatory policies that placed limits on broadcast radio and television ownership, moved towards a "pro-competitive," deregulatory approach towards media ownership. The Commission's deregulatory policies during this period, and Congressional passage of the Telecommunications Act of 1996, have encouraged massive waves of media group consolidation that has resulted in less ethnic minority media ownership in over the air broadcast radio and television. The train of FCC deregulation came to a halt, when the Third Circuit Court of Appeals stayed some of the Commission's proposed media broadcast ownership rule revisions, and remanded others for further justification by the Commission.

In July 2006, the Commission released its latest Further Notice of Proposed Rulemaking (FNPRM) to analyze the broadcast ownership rules remanded by the Third Circuit Court of Appeals in Prometheus v. FCC, and to invite public comment on how the Commission should address the issues raised in Prometheus to guide the Commission in future broadcast ownership rule making.

The Commission solicited public comments on the FNPRM through December 2006. It is the purpose of this comment to provide the Commission with additional information to guide it in future broadcast media ownership rulemaking proceedings—specifically as it pertains to the Commission's current local radio ownership rules. Through empirical research discussed in this comment, it is hoped that the Commission can disseminate this information to aid in the development and justification of future local radio ownership rulings by also taking into account factors such as consolidation, radio market share, and ethnic minority ownership of radio stations by surveying all Arbitron rated radio markets.

This comment proceeds in four parts. First, this comment explains the importance of diversity in media ownership by highlighting the assertion that ethnic minority media ownership often leads to diversity in broadcast viewpoints—an assertion that federal courts have affirmed. Next, the FCC's shift towards a deregulatory approach, and its effect on minority ownership of broadcast media, is discussed. Empirical data and research using the Herfindahl-Hirshchman Index (HHI) (the formula used by the U.S. Department of Justice and the Federal Trade Commission to measure market concentration) to analyze the effect that the Commission's and the 1996 Telecommunication Act's deregulatory initiatives have had on ethnic minority ownership in the Top 36 Arbitron rated, various California Arbitron rated radio markets, and the Mobile, Alabama radio market, surveyed from Spring 2005, through Summer 2006, is discussed. As radio has been described as the "Medium of Choice all Day" by the Radio Advertising Bureau, radio plays a significant role in the lives of most Americans as an information source, and as a forum for democratic dialogue—exposing people to diverse viewpoints. Moreover, given that prior federal court cases and several studies referenced in this comment have elucidated a link between broadcast ownership and content, it is critical that the Commission consider factors such as radio market consolidation, radio market share, and minority ownership and minority control of radio stations in these, and all, radio markets in developing and justifying future radio ownership rules. Finally, various policy recommendations to increase ethnic minority broadcast ownership are put forward to aid the Commission in future broadcast ownership rulemaking proceedings.

Why Diversity of Media Ownership Matters: Linking diversity of ownership to diversity in broadcast viewpoint.

In promulgating its licensing policies, the Commission has maintained the view that “diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints.”   The Commission has acted on this view by issuing regulations that limit multiple ownership of broadcast radio and television stations because “ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation, all of which are a critical aspect of the Commission’s concern with the public interest.”

The United States Supreme Court has endorsed the Commission’s goals of diversity of programs and service viewpoints.   In FCC v. National Citizens Committee for Broadcasting, the Supreme Court upheld the Commission’s regulatory rules barring newspaper/broadcast cross-ownership.   The Court found that the structural regulations on ownership met First Amendment standards because they “enhanced the diversity of information” and were “a reasonable means of promoting the public interest in diversified mass communications.”   In that case, the Supreme Court also affirmed the Commission’s reasoning that “[the] term public interest encompasses many factors including ‘the widest possible dissemination of information from diverse and antagonistic sources.’”

Despite the Commission’s view that diversity in ownership promoted diversity in programming content, the Commission was initially reluctant to extend this idea to ethnic minority broadcast media ownership. Several federal court decisions, therefore, clarified this notion for the Commission. In TV 9, Inc. v. FCC, the U.S. Court of Appeals for the District of Columbia, in reviewing a comparative hearing to determine the best applicant for a permit to construct a new television broadcast station, ruled that ethnic minority applicants for broadcast licenses should receive additional merit consideration:

We hold only that when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded.

In Metro Broadcasting, Inc. v. FCC, the U.S. Supreme Court upheld the idea that minority ownership leads to diverse broadcast content and viewpoint by holding that the Commission's minority preference programs, did not violate the Fifth Amendment's equal protection clause. In a 5-4 opinion, the majority stated that:

A broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogenous group. The predictive judgment about the overall result of minority entry into broadcasting is not a rigid assumption about how minority owners will behave in every case but rather is akin to Justice Powell's conclusion in Regents of University of California v. Bakke, 438 U.S. 265, 311-319 (1978) that greater admission of minorities would contribute, on average, to the "robust exchange of ideas."

The dissenters in Metro, led by Justices O'Connor and Kennedy, found the idea that ethnic minority ownership of stations transcends into diversity in media program content as "too amorphous," and "too insubstantial" to survive strict scrutiny. However, since the Metro opinion, several social science studies have supported the theory that ethnic diversity in media ownership leads to diversity in broadcast content and viewpoint.

The Commission's Deregulatory Era & the Telecommunications Act of 1996

In the 1980s, the Commission moved towards a laissez-faire, de-regulatory approach to promote diversity in broadcast ownership. During this period, the FCC embraced the theory that relying on market forces would better foster the public interest principles of competition, diversity, and localism. Mark Fowler, appointed Chairman of the Commission by then President Ronald Regan, advocated that:

The perception of broadcasters as community trustees should be replaced by a view of broadcasters as marketplace participants.

Fowler contended that communications policy should instead defer to market forces in such a way that the “public interest, then, defines the public interest.”

With this “pro-competitive” attitude in mind, and encouraged by the tremendous growth in the number and types of mass media outlets available to the public, the Commission began relaxing its broadcast media ownership policies starting with a revision to the “rule of sevens” in 1985. With this revision, the Commission now permitted ownership of twelve AM, twelve FM and twelve television stations, across the nation, by a single broadcast entity. In light of the increase in the number of AM and FM stations between 1980 and 1991, the Commission further relaxed its broadcast ownership rules by raising the radio ownership limits again to permit national ownership of eighteen AM and eighteen FM stations, across the nation, by any one broadcast organization.

In 1992, the Commission relaxed local and national radio ownership restrictions and adopted a tiered approach to radio concentration that allowed a single entity to own more radio stations in the largest markets (up to three AM and three FM stations, subject to a local audience reach limitation of 25% and a national cap of 30 AM stations and 30 FM stations) and fewer in the smallest markets. The Commission also ruled, for the first time, that licensees could own radio duopolies—radio stations in the same market with overlapping signal contours. The size and number of stations in a given market determined whether a particular duopoly proposal could be granted. Therefore, one owner could have owned any number of stations within a broad metropolitan area without any consideration of duopoly rules, as long as there was no overlap of the principal community contours of the stations.

The 1996 Telecommunications Act

In 1996, Congress overhauled the Telecommunications Act of 1934, by replacing it with a new Telecommunications Act that essentially allowed the Commission to relax broadcast media ownership restrictions even further. Through passage of the Telecommunications Act of 1996, Congress eliminated all limits on national radio ownership and raised the national television audience reach cap from 25% to 35%. Congress also eased local radio ownership limits, establishing a four-tier sliding scale limit of numerical caps that allowed for as many as eight co-owned radio stations in the largest markets. Congress did not include a new local television ownership rule in the 1996 Telecommunications Act, but directed the Commission to “conduct a rule-making proceeding to determine whether to retain, modify, or eliminate” its existing local television ownership restrictions.

The 1996 Telecommunications Act also relaxed the one-to-a-market rule (which generally prohibited common ownership of radio and TV stations in the same market by one entity) by expanding the applicability of waiving the “one-to-a-market radio/television cross-ownership restriction” to the fifty largest markets. Under the new one-to-a-market rule, a single owner could own, operate, or control combinations of up to seven radio stations and one television station in the market, depending on the number of independently owned media voices that remained in the market post-merger. Moreover, the Telecommunications Act of 1996 instructed the Commission to review its broadcast ownership rules biennially “to determine whether any of its rules were necessary in the public interest as the result of competition,” and to “repeal or modify any broadcast ownership regulations it determined to be no longer in the public interest.”

The Effect of the 1996 Telecommunications on the Radio Broadcast Industry

The passage of the Telecommunications Act of 1996 resulted in massive waves of media consolidation, mergers, and acquisitions in radio and television broadcast ownership. The Commission reported that industry concentration increased as the number of broadcast owners declined nationally by 11.7% from March 1996 to November 1997. Mergers among existing owners resulted in a

decrease from 5,105 to 4,507 owners during this period, despite a 2.5% increase in the number of radio stations. Similarly, local markets lost an average of one owner per market, with top ten markets averaging three existing owners per market. By comparison, 1067 transactions totaling $24.44 billion occurred in 1997, 952 transactions valued at $22.8 billion occurred in 1998, and 774 deals worth $33.32 billion occurred in 1999.
Peter DiCola, Director of Economic Analysis, and Kristin Thompson, Director of Research for the Future of Music Coalition highlighted the effect that the Telecommunications Act of 1996 had on consolidation and radio ownership in their 2002 report, "Radio Deregulation: Has it Served Citizens and Musicians?" By stating:
...the 1996 Act opened the floodgates for ownership consolidation to occur. From March 1996 to March 2002 the number of commercial stations increased by 5.6 percent—rising from 10,257 to 10,807—while the number of owners declined by 33 percent—from 5,133 to 3,408. Over the same period the size and holdings of a number of the largest station group owners increased drastically. In 1996, the two largest group owners had fewer than 65 stations each.

Several major television and radio broadcast corporations profited tremendously during this new era of relaxed restrictions on television and radio broadcast ownership. Clear Channel Communications, Inc. (Clear Channel) in particular, realized significant financial gains and market share in the radio industry in large part by the incentive to consolidate brought about by the Telecommunications Act of 1996 and the Commission's goal to deregulate broadcast media ownership. At the end of 1996, Clear Channel had $352 million in revenue and owned 101 U.S. radio stations. Three years after the Telecommunication Act of 1996 rule revisions, Clear Channel had "grown to 557 stations, 555,000 billboards and $2.7 billion in sales." In 2001, Clear Channel had $3.25 billion in revenue that accounted for 27.5% of the nationwide revenue share. As a result of consolidation, Clear Channel now owns over 1,200 radio stations in 49 states, and reaches over 100 million listeners in the U.S. each week. Clear Channel has also acquired